80-503

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

RICHARD A. KING,
ROBERT A. LAWRENCE,
CARLA L. HELWIG,
RALPH L. GARDNER,
WILLIAM J. WOODILL,
RICHARD J. REEDER,
FRANK SCOTT,

Petitioners,

v.

ELDRED S. WALLACE,
JEANNIE R. WALLACE,
JOHN R. DEBIASE,
ELIZABETH C. DEBIASE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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September 29, 1980

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QUESTION PRESENTED

Whether police officers may attempt to execute an arrest warrant by entering and searching the home of a third party for the person named in the arrest warrant when the police officers reasonably believe the person named in the warrant is on the premises, absent other exigent circumstances or consent of the homeowners.

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TO THE UNITED STATES COURT OF APPEALS
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TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Richard A. King,[1/] et al., by and through their counsel, respectfully pray that a writ of certiorari

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1/ Petitioner King was and is the Chief of the Fairfax County Police Department. The remaining Petitioners were Fairfax County police officers at all relevant times.

issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 1, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, not yet reported, appears in the Appendix hereto. The memorandum opinion and order of the United States District Court for the Eastern district of Virginia, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 1, 1980, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment IV

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be siezed.

Amendment XIV

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of two attempts by various Fairfax County police officers to execute a capias (bench warrant) for the arrest of Susan Wallace Swain, the daughter of respondents Eldred S. and Jeannie R. Wallace, and a close friend of respondents John R. and Elizabeth C. DeBiase. The capias had been issued in Mrs. Swain's divorce suit as a result of her failure to obey a court order. The police officers attempted to execute the arrest warrant on Susan Swain at the home of her parents, the Wallaces, on October 6, 1976, and at the home of the DeBiases, on November 10, 1976. In both instances, the police officers had probable cause to believe that Susan Swain was in the premises to be searched (App., p. 4). Susan Swain was not found on either occasion.

Respondents Wallace filed their complaint on October 5, 1977 in the United States District Court for the Eastern District of Virginia seeking damages and declaratory and injunctive relief against petitioners. The complaint alleged jurisdiction under 28 U.S.C. § 1331 and 1343, as authorized by 42 U.S.C. § 1983, and asserted that the searches on October 6, and November 10, 1976 violated the rights of respondents under the fourth and

fifth amendments to the United States Constitution as applied to the states through the due process clause of the fourteenth amendment. An amended complaint was filed on October 19, 1977 adding respondents DeBiase as plaintiffs. Both sides filed motions for summary judgment. Judge Oren R. Lewis issued a memorandum opinion and order (App., p. 1) on May 3, 1978 granting petitioners' motions for summary judgment and dismissing the case as to all parties. The District Court held that an arrest warrant provides authority for police officers to enter any premises for the purpose of executing the warrant if the officer has probable cause to believe the person named in the warrant is on the premises. The Court found that the police officers had both a valid arrest warrant for Susan Swain and probable cause to believe that Susan Swain was on the Wallaces' and DeBiases' premises.

Respondents appealed the decision to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit heard argument in February 1979 and reargument in October 1979. On July 1, 1980 the Fourth Circuit in a two to one decision affirmed in part and reversed in part. The Court ruled that no damages should be awarded against the petitioners as they had acted in good faith. However, the Court further ruled

that the respondents were entitled to declaratory and injunctive relief and remanded the case for the entry of an appropriate order.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts with the Decisions of Other Courts of Appeals as to Authority of Police Officers to Enter Third Party Homes to Execute Arrest Warrants.

The police officers in the instant case were in possession of a valid capias (hereinafter "arrest warrant") issued by a judge of the Circuit Court of Fairfax County for the arrest of Susan Swain. When the police officers attempted to execute the arrest warrant at the homes of the Wallaces and the DeBiases, they had probable cause to believe that Susan Swain was on those premises.

The Fourth Circuit ruled that a search warrant was a constitutional prerequisite to every search of the premises of a third person for a person named in an arrest warrant, absent consent of the owner or occupier or other exigent circumstances. This would be so even if the police officers had probable cause to believe the person named in the arrest warrant was on the premises.

The decision below is in direct conflict with the decisions of the United States Courts of Appeal for the

Fifth, Sixth, and Tenth Circuits, which have found that all that is needed by a police officer to enter and search a third party's home for a person named in an arrest warrant is the arrest warrant itself coupled with a reasonable belief (probable cause) that the person named in the warrant is on the premises. United States v. Woods, 560 F.2d 660 (5th Cir. 1977); United States v. Harper, 550 F.2d 610 (10th Cir. 1977); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), cert. denied, 430 U.S. 983 (1977); United States v. James, 528 F.2d 999 (5th Cir. 1976); Rodriguez v. Jones, 473 F.2d 599 (5th Cir. 1973); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967).

In Cravero, federal agents observed Chandler and Cravero, for whom arrest warrants were outstanding, and a third appellant, Willets, at a restaurant. The agents followed them to the home of a fourth appellant, Cook, and placed the house under surveillance. When other agents arrived with the warrants for Chandler, Cravero and a third man named Troise, the agents went up to the door, knocked, and announced they had arrest warrants. Cook opened the door and after a short exchange, warned the others. The agents immediately entered. Cravero was arrested in the living room. Chandler was arrested at the door of the master bedroom. As Chandler was arrested and disarmed, the

agents heard noises coming from an adjacent bathroom. Cook objected, but the agents, believing Troise was inside, entered and observed Willets, along with cocaine powder and paraphernalia used in the processing of narcotics, in plain view. After checking the shower stall unsuccessfully for Troise, the agents seized the cocaine and paraphernalia. 545 F.2d at 412-413.

Cook, Chandler, Cravero and Willets challenged the seizure urging, inter alia, that absent exigent circumstances, police could not execute arrest warrants at the residence of a third party not named in the warrants even if there was probable cause to believe the subjects of the warrants were on the premises. 545 F.2d at 413. The panel initially held that the entry by the agents was illegal, but justified the seizure as incident to legal arrests pursuant to warrants. 545 F.2d at 414-418. On petitions for rehearing and petitions for rehearing en banc, the portion of the opinion holding the entry illegal was withdrawn. The court noted that the law of the Fifth Circuit, which the panel opinion had ignored, was that "when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect." 545 F.2d at 421. (Citations omitted.) The court noted that the reasonableness of the officer's judgment is always subject to judicial review.

Confronted with the same issue in McKinney, the Sixth Circuit reached the same conclusion. 379 F.2d at 263. The Sixth Circuit opined that the issuance of an arrest warrant itself is an exceptional circumstance obviating the need for a search warrant. The magistrate's determination that there was probable cause to believe that the named party had committed an offense combined with the inherent mobility of the suspect justifies the search for the suspect, provided the authorities reasonably believed he could be found on the premises.

In Harper, the Tenth Circuit upheld the seizure of marijuana and heroin observed in plain view during a search for the subject of an arrest warrant in a third party's home where there were reasonable grounds for believing the subject was present. 550 F.2d 610, 613.

In the instant case, the petitioners had both a valid arrest warrant and probable cause to believe Susan Swain was on the respondents' premises. Applying the rule in Cravero, McKinney, and Harper, their entry and search for the suspect was clearly authorized. The Fourth Circuit's opinion is clearly in conflict with those of the Fifth, Sixth and Tenth Circuits.

Petitioners submit that this conflict justifies the grant of certiorari to review the judgment below. Rule 19(1)(b).

II. The Decision Below Will Have a Serious Impact on the Activities of Law Enforcement Officers.

As Judge Hall observed in his dissenting opinion (App., p. 18), it has long been established that the constitution permitted a law enforcement officer to enter a dwelling to execute an arrest warrant if such officer reasonably believed that the person named in the warrant was on the premises. United States v. Phillips, 593 F.2d 553 (4th Cir. 1978); Rodriguez v. Jones, 473 F.2d 599, 604-06 (5th Cir.), cert. denied, 412 U.S. 953 (1973); United States v. Brown, 467 F.2d 419, 423 (D.C. Cir. 1972) (Mr. Justice Clark); United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976), cert. denied, sub. nom. Cook v. United States, 430 U.S. 983 (1977); United States v. McKinney, 379 F.2d 259, 262-63 (6th Cir. 1967); Michael v. United States, 393 F.2d 22, 32 (10th Cir. 1968). If the decision below is allowed to stand, law enforcement officers will only be able to make such an entry and search for the person named in the warrant when the owner gives his consent or some other exigent circumstance exists. However, the Fourth Circuit itself is unclear as to what would constitute an "exigent circumstance" which would be an appropriate exception to the requirement for a search warrant in addition to the arrest warrant. (See App., p. 15.)

If the Fourth Circuit has difficulty determining when a search warrant is not required, it is obviously much

more difficult for a law enforcement officer to make such a determination. The effect of the decision below will be to require law enforcement officers to obtain a search warrant before attempting to serve an arrest warrant on third party premises in virtually all cases.

Furthermore, as is indicated by the cases and authorities cited on page 7, supra, the decision below is contrary to long-standing, prevailing judicial interpretation of the fourth amendment as it applies to execution of arrest warrants. Petitioners submit that a decision which would have such an impact on the activities of law enforcement officers in this country and which effects such a significant reinterpretation of the fourth amendment should come only from this Court. If, as petitioners contend, and as the Courts of Appeal for the Fifth, Sixth, and Tenth Circuits have held, that this requirement is not mandated by the fourth amendment, only this Court can provide the necessary relief.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

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September 29, 1980

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

ELDRED S. WALLACE, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	
RICHARD A. KING, et al.,	:	77-747-A
	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

The plaintiffs brought this 1983 suit against the named policemen-defendants seeking declaratory and injunctive relief and compensatory and punitive damages resulting from their attempt to execute a capias for the arrest of Susan Swain at their homes.

The plaintiffs say that the police must obtain a search warrant before entering and searching private premises to arrest a person on a capias even if they have probable cause to believe that the person named in the capias is on the premises, in the absence of consent or exigent circumstances.

The defendants rely upon the defense of good faith and probable cause.

The case is before the Court on cross-motions for summary judgment.

The material facts are not in dispute — most of which were stipulated.

The Fairfax County Police had a capias for the arrest of Susan Swain issued by a judge of the Circuit Court of Fairfax County, Virginia.

They were told by James Swain that Susan could be found at her parents' (the Wallaces) home, 8808 Badger Drive — that she stayed there from time to time and that her car, a blue Nova, was parked in the driveway — they were also told she might leave through the back door if she saw someone approach the front door.

Upon receiving this information, Sergeant Wilson directed Officers Lawrence and Helwig to go to the Wallace residence and execute the capias.

Upon arriving at the residence, Officers Lawrence and Helwig were met by Mr. Swain and another party, who advised them that Susan Swain was in the house at that time.

Whereupon the officers knocked on the front door and told the person answering (later learned to be Eldred S. Wallace) that they had a capias for the arrest of Susan Swain, and asked if they could come in. Mr. Wallace invited them into the living room and told them that Susan was not there — that she did not live there anymore, and that if she was, he would not tell them.

Officer Lawrence and Mr. Wallace remained in the living room discussing whether or not the police had a right to search his home on a capias — the policeman assured him that they did — while the men were talking, Officer Helwig walked back to the kitchen bar where Mrs. Wallace was standing and asked if she could look around — when Officer Lawrence told her to go ahead and look around, Officer Helwig looked in the open rooms off the hallway — Mrs. Wallace went along and opened several of the closed doors and turned on the lights at Officer Helwig's request and showed her where her daughter used to stay. She also told the officer that her daughter got mail at their house but that she did not know where she was then living.

Neither officer looked into the closets, the attic, or the basement. They did not find Susan.

Several days later another Fairfax County officer went by the Wallace residence looking for Susan. When told by the father that she was not there, the officer drove on after perfunctorily looking around the yard.

Later, two other Fairfax County police officers went to the DeBiase residence to execute the said capias — they knocked on the front door, told Mr. DeBiase that they had a capias for the arrest of Susan, and asked if they could come in. The[y] were invited in but told that Susan was not there and Mrs. DeBiase asked if they had a search warrant. They told her "no", they had a capias

which authorized them to search the premises if they had reasonable grounds to believe that Susan was there — while this brief discussion was going on, one of the officers turned on his flashlight and started to look around when Mrs. DeBiase turned on the lights so he could see. She said she didn't want him to fall down and get hurt. The officers left after a brief look around without finding Susan.

The police went to the DeBiase home because they received another call from Mr. Swain that he had followed Susan to the DeBiase residence and had seen her go into the house.

A police officer has the duty of arresting the person named in the capias wherever she be found in his bailiwick and that includes upon her premises or the premises of a third person if the arresting officer has reasonable belief or probable cause to believe that the person named in the capias is on the premises. See 5 Am.Jr. 2d, § 86, p. 774, and Restatement of Torts, 2d, § 204. Also, United States v. McKinney, 379 F2d 259 (6th Cir. 1967), and United States v. Cravero, 545 F2d 406 (5th Cir. 1976).

As early as 1925, the Supreme Court of the United States, in Agnello v. United States, 269 US 20, stated, "that an entry to execute an arrest warrant is an exception to the requirement of a search warrant to enter a home". See, also, United States v. Rabinowitz, 339 US 56 (1950).

Also, see United States v. Brown, 46 F2d 419 (D.C. Cir. 1972), where Mr. Justice Clark, sitting by designation, held that an arrest warrant provides authority for officers to enter any premises for the purpose of executing and enforcing the warrant if the officers have probable cause to believe the person named in the warrant is located in the premises.

The Court finds the officers had reasonable and probable cause to believe that Susan Swain was at the Wallace and DeBiase homes on the day in question — they knew she stayed at her parents' home on occasion and that the DeBiases were her close friends — the automobile she was known to drive was seen in the Wallace yard when they arrived to execute the capias and they were told by James Swain and another that she was seen entering the house on the day in question.

Further, the searches here made, if not consensual, which the Court finds them to be, were not unreasonable — it is undisputed that the officers were invited in both houses and that the women turned on the lights and/or opened some of the doors so that the officer might better see that Susan was not hiding in any of the rooms — the search, if you call i[t] that, was a perfunctory look or walk-around, after having been invited in by the owners of the premises.

Although the police officers enjoy no immunity from suit, they may avail themselves of good faith and

probable cause in a 1983 action. Pierson v. Ray, 386 US 547. This is an affirmative defense which may be properly raised before a jury, i.e., summary judgment may be rendered if the pleadings and affidavits show there is no genuine issue as to any material fact. The moving party is entitled to judgment as a matter of law. Federal Rules of Criminal Procedure 56(c). When a motion for summary judgment is properly supported by affidavits (depositions), the adverse party may not rest upon the mere allegations of his pleadings but must set forth specific facts showing that there is a genuine issue for trial. See Kipps v. Ewell, 538 F2d 564 (4th Cir. 1976).

There being no genuine issue for trial in this case, the defendants' motion for summary judgment ought to be granted and this case DISMISSED as to all parties, and

It Is So Ordered.

The Clerk is directed to send copies of this Memorandum Opinion and Order to all counsel of record.

May 3, 1978.

/s/ OREN R. LEWIS, United States Senior District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1399

Eldred S. Wallace and Jeannie R. Wallace, John R. DeBiase and Elizabeth C. Debiase, Appellants,

v.

Richard A. King, Chief, Fairfax County Police Department, Robert A. Lawrence, Carla L. Helwig, Ralph W. Gardner, William J. Woodill, Richard H. Reeder, Frank Scott, Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria
Oren L. Lewis, District Judge

Reargued: October 4, 1979 Decided: July 1, 1980

Before HALL and PHILLIPS, Circuit Judges
and THOMSEN*, Senior District Judge

John McNally (Murphy, McGettigan, McNally & West; Jonathan Shapiro, Zwerling & Shapiro; Stephen W. Bricker, American Civil Liberties Union of Virginia on brief) for Appellants; Jack B. Stevens (Howard, Stevens, Lynch, Cake & Howard, P.C. on brief) for Appellees.

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*Of the District of Maryland, sitting by designation.

THOMSEN, Senior District Judge

Plaintiffs/appellants are two married couples whose residences were briefly searched without search warrants by local police officers seeking to apprehend a woman named in a valid arrest warrant. She was being sought in connection with her refusal to obey a court order in a domestic relations matter involving the custody of her infant child.

Plaintiffs filed suit under 42 U.S.C. § 1983 against the officers who conducted the searches and the chief of the Police Department of Fairfax County, Virginia, seeking money damages as well as declaratory and injunctive relief. They sought to have the district court declare unconstitutional a longstanding, unwritten policy of the department which authorized police officers to search any place without a search warrant when they had a reasonable belief that a person named in an arrest warrant would be found there. Following extensive discovery the district court entered summary judgment for defendants on all claims. Plaintiffs appealed.

After hearing argument in February 1979 and reargument in October 1979, we withheld decision of these appeals pending a decision of the Supreme Court in Payton v. New York and Riddick v. New York, in which probable jurisdiction had been noted on December 11, 1978 (439 U.S. 1045), oral argument had been heard and

the case set for reargument (441 U.S. 930). The reargument resulted in four opinions filed on April 15, 1980, ____ U.S. ____, 48 U.S.L.W. 4375.

Payton involved an entry by the police officers into the home of a person suspected of a felony, when the police had obtained neither an arrest warrant nor a search warrant. The Court held that the Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home, in the absence of exigent circumstances, in order to make a routine felony arrest.

I.

This case arises from the unsuccessful attempts of various Fairfax County police officers to execute a bench warrant for the arrest of Susan Wallace Swain, which had been issued in connection with Mrs. Swain's divorce suit as a result of her failure to appear in court with her infant child. Plaintiffs Eldred and Jeannie Wallace are Mrs. Swain's parents and reside in Fairfax County. Plaintiffs John R. and Elizabeth C. DeBiase are friends of the Wallaces who also reside in Fairfax County, some distance away from the Wallace residence.

A. Search of the Wallace Home

The Wallaces are in their mid-fifties. Mr. Wallace is a long-term civil service employee of the Department of the Army; Mrs. Wallace is a housewife. Mrs. Swain had not lived with the Wallaces for a number of years but occasionally stayed with them when problems arose with her husband.

On October 6, 1976, the Fairfax police received a phone call from Mrs. Swain's estranged husband. He informed them that Mrs. Swain was at her parents' home and, upon meeting two officers at the residence, identified a car parked outside as belonging to his wife. The car was actually licensed in the Wallaces' name.

At approximately 8:30 p.m. Officers Robert Lawrence and Carla Helwig were admitted into the Wallace residence, without demur. Officer Lawrence announced that he wanted to search the home for Mrs. Swain because he had a bench warrant for her arrest and had information indicating that she was on the premises. Mr. Wallace asked the officers if they had a search warrant for his home. One of the officers responded that the arrest warrant itself was sufficient authority for the search.

The search was a walk-through which took only a few minutes. Mrs. Wallace showed Officer Helwig various rooms and closets and, at Officer Helwig's request, opened doors and turned on lights as the two went through the house.

Both officers concede that they had ample time to go to a magistrate and secure a search warrant. They knew that the arrest warrant for Mrs. Swain arose from a domestic relations matter involving the welfare of a young child, but they had not been advised of any urgent or dangerous circumstances requiring immediate arrest.

The parties dispute whether the officers were hostile in conducting the search. The Wallaces claim that the emergency lights on the officers' vehicle were flashing outside during the incident, but the police deny this.[1] Mr. Wallace claims that his asthmatic condition was aggravated by the search and attendant circumstances, causing him to miss work the following day.

B. Search of the DeBiase Home

About one month after the Wallace home was searched, on November 10, 1976, the Fairfax police were again contacted by Mr. Swain. He telephoned the police station to complain that the department was dilatory in locating his wife and baby. He left a number where he could be reached; Sergeant Frank Scott telephoned the number and talked with a man identifying himself as Mr. Swain.

Swain informed Scott that he had seen his wife enter the DeBiase residence. (The police had previously made

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1/ Even if the lights were flashing, that does not show hostility on the part of the officers.

inquiry about Mrs. Swain at this residence three days after the Wallace home was searched, but made no attempt to search the DeBiase home at that time.) Sergeant Scott had information on a note from another police officer indicating there was some reason to suspect that Mr. Swain was using the department to harass people in the county. Scott confronted Swain with this allegation and informed him that, if it were true, Scott would seek legal action against him. Swain denied the allegation and, without further inquiry, Scott ordered the DeBiase residence searched.

At about 6:00 p.m. Officers William Woodill and Ralph Gardner arrived at the DeBiase home. Mrs. DeBiase, a fifty-three year old housewife, and her daughter were home at the time. They saw the police outside and Mrs. DeBiase went to the door as the officers knocked. They stated they would like to ask her some questions and she invited them inside. Officer Gardner then stated that the department had information that Mrs. Swain might be living there; Mrs. DeBiase denied this and asked who had supplied such information. Gardner identified Mr. Swain as the source and then stated that he wanted to search the house. Apparently Mrs. DeBiase did not question Mr. Swain's reliability, but, with knowledge of the earlier search of the Wallace residence, she objected to the search and demanded to see a search warrant. She was told that the arrest warrant was sufficient authority for the search.

Mrs. DeBiase claims that during the search two cruisers and a paddy wagon were parked outside with lights flashing (see n.1 supra) and that her pre-existing stomach ulcer was aggravated by the search and attendant circumstances, causing her to seek medical treatment.

II.

Plaintiffs argue that the department's policy, which authorized officers to search any place without a search warrant when they had a reasonable belief that a person named in a valid arrest warrant might be found there, contravened the "particularity" requirement of the fourth amendment and undercut the rationale upon which fourth amendment jurisprudence is founded. The primary abuse which the fourth amendment was intended to eliminate was the dreaded general warrant which authorized indiscriminate searches of whole neighborhoods; plaintiffs herein contend that if the police alone may decide whether any particular place will be searched, the potential for this abuse is facilitated. See Lankford v. Gelston, 364 F.2d 197 (4 Cir. 1966).

In United States v. Phillips, 593 F.2d 553 (4 Cir. (1978), the premises searched had been a regular rendezvous used by members of a narcotics distribution ring in furtherance of their unlawful activities; this court held that under the facts of that case "the agents

were entitled to obtain entry, especially when armed with arrest warrants, despite the absence of a search warrant," in order to make a criminal arrest. The opinion cited and quoted with approval passages from Rodriguez v. Jones, 473 F.2d 599, 606 (5 Cir.), cert. denied, 412 U.S. 953 (1973), including quotations from the Restatement (Second) of Torts.

The issue presented by the instant case — whether a search warrant is a constitutional prerequisite to every search for a person named in an arrest warrant on the premises of a third person — has not been decided by the Supreme Court or by this Circuit. In Payton the Court noted that neither of the cases before it "raises any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect." ____ U.S. at ____, 48 U.S.L.W. at 4378. However, much of the discussion in the majority opinion bears on the proper answer to the question presented in this case, which we specifically refrained from deciding in Lankford.

As the Court noted in Payton, the circuits have not been uniform in their approach to the problem presented by the instant case. Compare United States v. Brown, 467 F.2d 419, 423 (D.C. Cir. 1972), and United States v. McKinney, 379 F.2d 259, 263 (6 Cir. 1967), with United States v. Ford, 553 F.2d 146, 159 n.45 (D.C. Cir. 1977), Fisher v. Volz, 496 F.2d 333, 341-43 (3 Cir. 1974), Government of the Virgin Islands v. Gereau, 502 F.2d

914, 928 (3 Cir. 1974), and United States v. Cravero, 545 F.2d 406, 415, 421 (5 Cir. 1976). Common to all those opinions, however, is the requirement that, for the search to be constitutionally valid, not only must the officers have probable cause to believe the person named in the arrest warrant is on the premises of the third person, but there must also exist an appropriate exception to the warrant requirement, e.g., consent of the owner or occupier of a dwelling unit or exigent circumstances, which did not exist in this case. It is not practical, in this opinion, to list all the circumstances which may justify such entry. Exigent circumstances may properly include hot pursuit or justifiable fear of injury to persons or property if the arrest is delayed. Whether the entry sought to be made is in an area where a magistrate is or is not readily available, and whether another officer is available to keep watch on the premises while an officer seeks a search warrant, are among the factors which may be considered in appropriate cases. The nature of the premises sought to be entered and whether the officers have reasonable cause to believe that the subject of the arrest warrant owns or resides therein are other factors. Reasonable or probable cause to believe that a person for whom an arrest warrant has been issued is on the premises, standing alone, is not sufficient. Although Payton held that an arrest warrant requires that a suspect "open his doors to the officers of the law," that holding was

specifically limited to the "dwelling in which the suspect lives." ____ U.S. at ____, 48 U.S.L.W. at 4383. An arrest warrant indicates only that there is probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in a stranger's house. Fisher v. Volz, 496 F.2d at 341. Injunctive and declaratory relief should be issued by the district court in conformity with the principles stated herein.

On the other hand, law enforcement officers should not be held personally liable for monetary damages because they have followed the policy or instructions of their superiors, where the controlling law had not been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state, where the officers have acted in good faith, and where the searches were conducted in a reasonable manner, as shown by the evidence in this case. Insofar as the judgment below absolved the defendants from monetary liability to the plaintiffs, it should be affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR THE ISSUANCE OF DECLARATORY AND INJUNCTIVE RELIEF IN CONFORMITY WITH THIS OPINION.

HALL, Circuit Judge, dissenting:

I agree with the majority that the officers acted in good faith and that the searches were conducted in a reasonable manner. However, I do not agree that a valid arrest warrant and probable cause are constitutionally insufficient to justify a search for the suspect upon a third person's premises. The majority's additional requirement of a search warrant in such circumstances causes me grave concern, and I must respectfully dissent.

The broad arguments advanced by the plaintiffs were considered and rejected in United States v. Phillips, 593 F.2d 553 (4th Cir. 1978). Phillips involved the search of a residence which federal officers had observed for about one year to be a gathering place for members of a narcotics distribution ring. After obtaining valid arrest warrants, the policemen sought to execute the warrants at the residence. Though no one responded to their knocks at the door, the officers heard noises within the house. They forcibly entered and proceeded to search for the named suspects. During their search, the officers seized evidence lying in plain view which was later used at trial.

The Phillips defendants objected to admission of the evidence on the ground that it was illegally seized, and raised the issue on appeal. We held that the search was

reasonable and that it did not violate the fourth amendment, although no search warrant was obtained. We did so on the ground that it has long been established that police officers may lawfully enter a dwelling, with force if necessary, to execute a valid arrest warrant, where they reasonably believe that the named suspect is on the premises. Id. at 557; Rodriguez v. Jones, 473 F.2d 599, 604-06 (5th Cir.) cert. denied, 412 U.S. 953 (1973); United States v. Brown, 467 F.2d 419, 423 (D.C. Cir. 1972) (Mr. Justice Clark); United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976) cert. denied, sub. nom. Cook v. United States, 430 U.S. 983 (1977); United States v. McKinney, 379 F.2d 259, 262-63 (6th Cir. 1967); Michael v. United States, 393 F.2d 22, 32 (10th Cir. 1968). See Lankford v. Gelston, 364 F.2d 197, 205-06 (4th Cir. 1966); Vance v. North Carolina, 432 F.2d 984, 990-91 (4th Cir. 1970).[1/]

1/ In 1975, twenty-five states had statutes authorizing warrantless entries to arrest in residences, absent exigent circumstances. Note, "Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem," 1978 U.Ill.L.F. 655, 668-69. Several of our sister circuits have recently held that per se violations of fourth amendment rights occur when police officers enter residences with neither an arrest warrant nor a search warrant, absent exigent circumstances. United States v. Kilabrew, 560 F.2d 729, 733 (6th Cir. 1977); United States v. Reed, 572 F.2d 412, 420-23 (2nd Cir.) cert. denied sub. nom. Goldstein v. United States, 99 S.Ct. 283 (1978). Contra, United States ex rel. Wright v. Woods, 432 F.2d 1143, 1145-46 (7th Cir. 1970).

I see no necessity to create an exception to this rule for third-party residences because a magistrate's evaluation of probable cause prior to such a search will have no appreciable effect upon the privacy interests to be protected. The search is intrusive upon those privacy interests whether or not exigent circumstances are present or a search warrant is obtained. Lankford v. Gelston, 364 F.2d at 206. The resident's privacy interest centers primarily on the manner and extent of the search conducted—a matter unaffected by a warrant requirement since it cannot be reviewed before the fact.

Also, the search for a person named in an arrest warrant presents inherent exigencies not present in the search for objects. See Vance v. North Carolina, 432 F.2d at 990-91. Named suspects frequently pose a threat of danger to the police and to the public, necessitating the swiftest possible execution of arrest warrants. The suspect's very failure to present himself to the police may, in a practical sense, be viewed as an exigency justifying an exception to the warrant requirement of the fourth amendment. In most cases other circumstances, such as the gravity of the crime or the stability and dangerous propensities of the suspect, are present when the suspect eludes the police. See United States v. McKinney, 379 F.2d at 263; United States v. Brown, 467 F.2d at 424.

In this case no exigent circumstances appeared. Although the custody and welfare of a young child was at issue, no felony was suspected. The suspect was wanted for failure to appear in court. She was not considered unstable or dangerous. Nevertheless, I think no purpose would have been served by requiring the officers here to make a separate trip to the magistrate each time they formed a reasonable belief as to her presence in a particular dwelling. To impose such a rule would have hampered them in their duties while giving no appreciable benefit to the residents of the dwellings.

I hasten to add that any search conducted under these circumstances may be challenged in federal tort actions by a resident of the dwelling searched, on the ground that an officer's belief was unreasonable or that the conduct of the search was unreasonable. 42 U.S.C. §1983. See Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1974); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The reasonable belief standard is not without teeth. See United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976):

> The test is properly framed in terms of reasonable belief. Probable cause is essentially a concept of reasonableness, but it has become a term of art in that it must always be determined by a magistrate unless exigent circumstances excuse a search warrant .... Reasonable belief embodies the

> same standards of reasonableness [as probable cause] but allows the officer who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.

(Footnote and citations omitted). The reasonableness of the search itself must be determined on a case-by-case basis. In many circumstances a brief and courteous walk-through is sufficient to determine if a suspect is in fact in the home.

The recent Supreme Court decision in Payton v. New York, ____ U.S. ____, 48 U.S.L.W. 4375 (April 15, 1980), does not require a contrary conclusion. As the majority notes, Payton did not address the issue presented here.

Accordingly, I would find that the police need not obtain a search warrant for third-party dwellings when they have a reasonable belief that the person named in a valid arrest warrant is in the dwelling.